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In the

Supreme Court of the United States

October Term, 1949.

CONSUMERS COOPERATIVE ASSOCIATION, *Petitioner*,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, AND JOSEPH B. FLEMING AND AARON COLNON, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT.

GUY W. GREEN,
735 Lathrop Building,
Kansas City, Missouri,
Attorney for Petitioner.

IRWIN SNATTINGER,
National Bank of Topeka Bldg.,
Topeka, Kansas,
SAM MANDELL,
1111 Scarritt Bldg.,
Kansas City, Mo.,
Of Counsel.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT.

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Consumers Cooperative Association of Phillipsburg, Kansas, respectfully presents this peti-

tion for review on writ of certiorari of the decisions of the United States Court of Appeals, Tenth Circuit, rendered March 20, 1950, in the cases of Chicago, Rock Island and Pacific Railroad Company, and Joseph B. Fleming, and Aaron Colnon, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, appellants and cross-appellees, v. Consumers Cooperative Association, appellee and cross-appellant, Nos. 3965 and 3966, 180 F. (2d) 900. (133-145.)

Opinions Below.

The sole issues before the Court of Appeals was the submissibility of the cases made by the parties in the District Court, where directed verdicts were entered against the plaintiffs and against the defendant on its counterclaim (99-105). It is our belief that in ruling the issues the Court of Appeals failed to follow the controlling substantive law of Kansas which governed the rights of all of the parties to the action. The Honorable Walter A. Huxman, Judge of the Tenth Circuit, long a distinguished practicing attorney at Hutchinson, Kansas, before his elevation to the Bench, and thoroughly versed in the laws and decisions of that state, filed a dissenting opinion in the cause (141-145) which lends weight to our contention that the Court of Appeals failed to follow the controlling law of the State of Kansas. Therefore, among our grounds for applying for review on writ of certiorari are the identical grounds on which the writ was allowed in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Court of Appeals, Tenth Circuit, on writ of certiorari is invoked under 28 U. S. C. A., Sec. 1254, and Rule 38 of the Supreme Court of the United States effective February 27, 1939. The opinion of the Court of Appeals was filed March 20, 1950 (133-145). Defendant's petition for rehearing was denied April 14, 1950 (159). This petition for review on writ of certiorari is filed within ninety days of March 20, 1950, and is therefore timely. 28 U. S. C. A., Sec. 2101.

Summary Statement.

Respondents here were plaintiffs in the District Court, and your petitioner was defendant there. We believe it will simplify our statement if we refer to the parties as they appeared in that Court.

The complaint (4-18) invoked jurisdiction on diversity of citizenship the defendant being a citizen of Kansas and the plaintiffs all being noncitizens of that state. It is alleged that plaintiffs' high speed Diesel-motored train No. 7, known as the Rocky Mountain Rocket, running between Chicago and Denver, collided with a gasoline transport truck of the defendant at the grade crossing of plaintiffs' tracks with Highway No. 383 at a point about 7 miles west and south of Norton, Kansas. The train was traveling west, the truck proceeding in a southerly direction. The complaint alleges specific negligence of the defendant in driving its transport truck upon plaintiffs' track when train No. 7 was immediately approaching at a speed of 60 to 65 miles an hour and when the train was so close to the crossing that it could not be stopped or its speed reduced to avoid a collision; that the defendant violated Sec. 8-566,

1947 Supplement of the General Statutes of Kansas, 1935 (see Appendix) which requires that vehicles carrying inflammable liquids shall stop within 50 feet but less than 10 feet from the nearest rail of any railroad before crossing the same; that defendant violated Rule XXI promulgated by the State Fire Marshal of the State of Kansas (see Appendix) which requires every vehicle transporting inflammable liquids to be brought to a complete stop immediately before crossing any railroad track and not to proceed thereover until it is safe to do so; that plaintiffs' locomotive was equipped with headlights visible for a great distance and that defendant failed to look for such headlights; that if the driver of the transport had kept a lookout he would have seen the headlights when the train was approaching near the crossing; that the driver could and should have heard the blast of the whistle of the train before it reached the crossing; that if the driver stopped before entering upon the track, he was negligent in proceeding upon it in front of the approaching train.

The complaint further alleges that the transport was carrying 3,000 gallons of gasoline and 1,300 gallons of distillate; that a fire resulted from the collision which did substantial damage to the train; that the engineer and fireman of the train were instantly killed and that the driver of the gasoline transport was instantly killed.

Defendant filed an answer and counterclaim (19-21) in which it admitted the collision and charged that the railroad was guilty of negligence in operating its train at a dangerous and reckless rate of speed under the conditions existing; that it failed to maintain a reasonably sufficient lookout and that it failed to have the train under any or reasonable control.

Plaintiffs asked for damages of $227,488.15 to their train. Defendant's counterclaim asked for damages of $20,000.00 to its transport and contents.

No eyewitnesses to the collision testified at the trial. Plaintiffs' witnesses testified that the headlights of the train were burning before the collision, that they could be seen for a considerable distance and that the whistles on the train were being sounded, and that these could be heard for a considerable distance (44-96). Plaintiffs' proof showed that defendant's transport was cut in two by the collision (64, 65, 76). Please see defendant's Exhibit B (129). Plaintiffs' conductor and brakemen (62, 70, 75) testified that they felt the brakes on the train applied about 3 to 5 seconds before the collision. Plaintiffs' tracks run in a straight line for 1,941 feet east of the crossing and then swing to the northeast. Please see plaintiffs' Exhibit 1 (107). The required speed of plaintiffs' Rocket trains east of the curve shown in the exhibit is 75 miles an hour, 60 miles an hour in the curves and 85 miles an hour in the straightaway approaching and over the crossing. The train was 24 minutes late when it left Norton 7 miles to the east (57, 58, 60, 67). The collision occurred at 3:34 A. M. (62). In answer to interrogatories plaintiffs stated that the engineer and fireman of the train had a clear view of the crossing at night with the engine headlight of 800 to 1,000 feet (83). At a speed of 80 miles an hour stopping distance of the train was one mile (83).

At the close of plaintiffs' case the trial court sustained defendant's motion for directed verdict on the ground that the circumstantial evidence upon which plaintiffs relied to prove defendant's negligence did not overcome the presumptions of due care, compliance with law and love of life of the driver of the transport truck (99-101). Defendant then asked for leave to dismiss its counterclaim without prejudice and was denied such right. Defendant then announced it would stand on the record as

made by the plaintiffs (103). The Court then directed a verdict against the defendant on its counterclaim (103-104).

Motions for new trial were filed by the parties and were by the trial court overruled (35-38). Plaintiffs and defendant filed separate notices of appeal (41, 42). The case was fully briefed and argued in the United States Court of Appeals for the Tenth Circuit. Two opinions were filed in the case on March 20, 1950, the majority opinion by Judge Bratton in which Judge Murrah concurred, 180 F. (2d), 902-906 (133-140), and a dissent by Judge Huxman, 180 F. (2d) 906-908 (141-145). The majority opinion ruled that the trial court erroneously sustained defendant's motion for directed verdict, holding that under *Lavendar* v. *Kurn*, 327 U. S. 645, the evidence adduced by the plaintiffs tended to establish probative facts and circumstances from which a jury could draw the reasonable deduction that the driver of the motor transport was negligent and that his negligence was the proximate case of the collision. In his dissent Judge Huxman held that the circumstantial evidence on which plaintiffs relied was not sufficient, under controlling Kansas authorities cited by him, to overcome the presumption that the deceased driver of the transport exercised due care. In each of the opinions the trial court's ruling on plaintiffs' motion for directed verdict against defendant's counterclaim was affirmed.

Questions Presented.

I.

Was plaintiffs' circumstantial evidence of sufficient probative force to overcome the presumption of love of life, compliance with law and the exercise of due care by the deceased gasoline transport driver under the controlling Kansas authorities?

II.

Was plaintiffs' circumstantial evidence of sufficient probative force to overcome the presumption of love of life, compliance with law and the exercise of due care by the deceased gasoline transport driver under the holding of this Court in *Lavendar* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916?

III.

Where Federal jurisdiction exists solely because of diversity of citizenship, are not the Federal Courts under an absolute duty to follow controlling State authorities?

IV.

Did the Court of Appeals for the Tenth Circuit follow or contravene the controlling authorities of Kansas in arriving at the majority opinion?

V.

Does not the opinion filed contravene the ruling of this Court in *Looney* v. *Metropolitan Railroad Co., et al.*, 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564, which holds that direct evidence is necessary to overcome the presumption of due care and performance of duty and that one presumption cannot be built upon another?

VI.

Does not the majority opinion filed build presumption upon presumption and inference upon inference in order to reach the conclusions made?

Reason for Granting the Writ.

I.

The majority opinion correctly states the applicable controlling law of Kansas, as follows:

> "The Supreme Court of Kansas has held without deviation that ordinarily it will be presumed that a deceased person exercised reasonable care for his safety. The presumption rests upon the instinct of self-preservation. Its source is the premise that the love of life common to all prompts a person to exercise such care as the circumstances permit to protect himself from injury or death. *Chicago, Rock Island & Pacific Railway Co.* v. *Hinds,* 56 Kan. 758, 44 Pac. 993; *Kansas City-Leavenworth Railroad Co.* v. *Gallagher,* 68 Kan. 424, 75 Pac. 469; *Eidson* v. *Chicago, Rock Island & Pacific Railway Co.,* 85 Kan. 329, 116 Pac. 485; *Smith* v. *Bassett,* 159 Kan. 128, 152 Pac. (2d) 794; *Henderson* v. *National Mutual Casualty Co.,* 164 Kan. 109, 187 Pac. (2d) 508. And in the absence of convincing evidence to the contrary, it will be presumed that a person about to cross a railroad track both looked and listened before venturing to do so. *Chicago, Rock Island & Pacific Railway Co.* v. *Hinds, supra; Kansas City-Leavenworth Railroad Co.* v. *Gallagher, supra.* But the presumption is a rebuttable one which may be overcome by direct or circumstantial evidence sufficiently strong for that purpose." (138.)

In ruling that plaintiffs' circumstantial evidence was sufficient to overcome the presumption of due care of the deceased driver of the gasoline transport, the opinion conflicts with the controlling Kansas authorities as pointed out in the dissent, wherein Judge Huxman said:

> "In case number 3965, the Rock Island was the plaintiff. It charged Consumers Cooperative Associa-

tion with negligence in driving its truck across a railroad crossing. In effect, it charged the driver with negligence in the operation of the truck in crossing the tracks. At the outset, the Railroad Company was faced with the necessity of overcoming by evidence a prima facie case of due care on the part of the driver in operating the transport truck. The only question on this appeal is whether the Rock Island introduced probative evidence, direct or circumstantial, of sufficient weight, which, if believed by the jury, would overthrow the prima facie case of the exercise of due care by the driver of the truck.

"As it was pointed out, it is conceded that the ground was level; that the train approaching the crossing with the headlight burning, which could be seen at a great distance; and that the train was travelling at a speed of approximately 65 miles per hour.

"My associates are of the view that this constitutes sufficient evidence to take the question of due care on the driver's part to the jury. With this, I cannot agree. The legal presumption that the deceased driver exercised due care implies that he looked, saw the approaching train, and had sufficient time to cross otherwise there could be no presumption that he exercised due care in attempting to cross the tracks. To me it seems simple logic that the existence of facts which gives rise to a presumption that the deceased exercised due care in attempting to cross the tracks, standing alone, unsupported by other evidence, is insufficient to overcome the prima facie case arising from the presumption." (142-143.)

II.

In *Looney* v. *Metropolitan R. Co.*, 200 U. S. 480, ..., 26 S. Ct. 303, 306, 50 L. Ed. 564, this Court said:

" * * * A plaintiff in the first instance must show negligence on the part of the defendant. Having

done this, he need not go farther in those jurisdictions where the burden of proof is on the defendant to show contributory negligence. In other words, if there is no evidence which speaks one way or the other with reference to contributory negligence of the person killed, then it is presumed that there was no such negligence. Thomp. Neg. §401; *Baltimore & P. R. Co.* v. *Landrigan*, 191 U. S. 461, 48 L. Ed. 262, 24 Sup. Ct. Rep. 137; *Texas & P. R. Co.* v. *Gentry*, 163 U. S. 353, 41 L. Ed. 186, 16 Sup. Ct. Rep. 1104. But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another. *Douglass* v. *Mitchell*, 35 Pa. 440; *Philadelphia City Pass. R. Co.* v. *Henrice*, 92 Pa. 431, 37 Am. Rep. 699; *Yarnell* v. *Kansas City, Ft. S. & M. R. Co.*, 113 Mo. 570, 18 L. R. A. 599, 21 S. W. 1."

The majority opinion conflicts with this ruling. There was no direct evidence to overcome the presumption of due care on the part of the deceased transport driver. The majority opinion achieves its conclusion by building presumption upon presumption and by piling inference upon inference. It holds that circumstantial proof that the gasoline transport truck was upon the tracks at the time it was run into and cut in half by respondent's train showed that the deceased transport driver negligently failed to observe the headlights of the oncoming train and that he negligently failed to heed its warning whistles, and that he therefore carelessly and unlawfully failed to stop before driving upon the tracks; that he therefore carelessly and negligently and unlawfully drove the truck upon the tracks in the face of the oncoming train and at a time when it was unsafe for him to do so. We respectfully

submit that the majority opinion makes surmise and speculation, and not proof, a basis of recovery in contravention of every known rule of law.

III.

Lavendar v. *Kurn*, on which the majority opinion is based, is not applicable. There this Court held that the railroad's negligence was inferable from the physical facts and circumstances shown in evidence. This Court did not hold that such circumstances and facts overcome the presumption of due care of the deceased. That question was not in the *Lavendar* case. Moreover, *Lavendar* v. *Kurn* arose under the Federal Employers' Liability Act, and the public policy of the United States as expressed in that Act was involved. Here we deal only with rights arising under the laws of Kansas. We believe that the majority opinion misapplies and conflicts with the rule in *Lavendar* v. *Kurn*.

IV.

The majority opinion failed to follow the controlling applicable Kansas authorities and is therefore in error. *Erie R. Co.* v. *Thompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

V.

It is our humble opinion that the majority opinion of the Court of Appeals has thus decided important questions of local law in a way probably in conflict with applicable local decisions as above noted, and that good and special and important reasons, all appealing to sound judicial discretion, exist for the granting of the writ within paragraph 5(b) of Rule 38 of this Court.

Prayer.

Wherefore, your petitioner prays that a writ of certiorari be issued out of this Court directed to the Court of Appeals, Tenth Circuit, commanding said Court to certify and send to this Court a transcript of the record in the cases entitled Chicago, Rock Island and Pacific Railroad Company, and Joseph B. Fleming and Aaron Colnon, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, appellants and cross-appellees, v. Consumers Cooperative Association, appellee and cross-appellant, Nos. 3965 and 3966, including also the proceedings in said Court, to the end that said cause may be reviewed and determined by this Court and the judgment of the Court of Appeals be reversed.

GUY W. GREEN,
735 Lathrop Building,
Kansas City, Missouri,
Attorney for Petitioner.

IRWIN SNATTINGER,
National Bank of Topeka Bldg.,
Topeka, Kansas;
SAM MANDELL,
1111 Scarritt Bldg.,
Kansas City, Mo.,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

The facts with reference to the opinions below, the jurisdiction of this Court, the issues, the pleadings and the evidence have been sufficiently covered in the petition and will not here be repeated.

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals, Tenth Circuit erred:

1. In holding that plaintiff's circumstantial evidence was sufficient to overcome the presumption of due care, compliance with law and love of life which the law indulges in favor of the deceased transport driver.

2. In holding that plaintiffs' circumstantial evidence was sufficient to prove the allegations of negligence made in the complaint.

3. In failing to apply the controlling Kansas authorities under which it must be held that plaintiffs' circumstantial evidence was insufficient to destroy the presumption of due care, compliance with law and love of life on the part of the deceased driver, and insufficient to prove negligence of the defendant.

ARGUMENT.

I.

Plaintiffs' circumstantial evidence was insufficient to destroy the presumption of due care, compliance with law and love of life of the deceased transport driver.

The basis of plaintiffs' claims against the defendant is that its deceased driver was negligent in driving the transport onto the tracks in the face of an oncoming train. The only known eyewitnesses to the collision, the driver of the transport truck and plaintiffs' engineer and fireman, were all killed. No one knows when the gasoline transport went upon the tracks. Certainly plaintiffs' evidence makes no such showing. With the driver dead, the law presumes that he exercised due care in driving upon the tracks and that he was exercising due care at the moment of death. *Chicago, Rock Island & Pacific Railway Co.* v. *Hinds,* 56 Kan. 758, 44 P. 993; *Kansas City-Leavenworth Railroad Co.* v. *Gallagher,* 68 Kan. 424, 75 P. 469, 64 L. R. A. 344; *Eidson* v. *Chicago, Rock Island & Pacific Railway Co.,* 85 Kan. 329, 116 P. 485; *Smith* v. *Bassett,* 159 Kan. 128, 152 P. (2d) 794; *Henderson* v. *National Mutual Casualty Co.,* 164 Kan. 109, 187 P. (2d) 508.

In *Smith* v. *Bassett,* 159 Kan. 128, 134, 152 P. (2d) 749, the Court said:

> " * * * Ordinarily the presumption is that a person with love of life, common to all, exercises such due care as the circumstances permit to protect himself from injury (*Eidson* v. *Railway Co.,* 85 Kan. 329, 116 Pac. 485; *Sams* v. *Commercial Standards Ins. Co.,* 157 Kan. 278, 284, 139 P. (2d) 859). In view of this presumption and the lack of evidence to

clearly overcome it as a matter of law we think the motion for a directed verdict was properly overruled." (Emphasis ours.)

The Court of Appeals was in error in holding that plaintiffs' circumstantial evidence was *clearly* sufficient to overcome the presumption.

II.

Plaintiff's circumstantial evidence was insufficient to prove the allegations of negligence made in the complaint.

It is the settled law and policy of Kansas that a fact is not proven by circumstances which are merely consistent with its existence, and that while negligence may be proved by circumstantial evidence, the circumstances must point directly to the negligence of the defendant and must go further than to be merely consistent with negligence. *Canestro* v. *Joplin-Pittsburg Rld. Co.*, 135 Kan. 337, 10 P. (2d) 902; *Miller* v. *Gabbert*, 154 Kan. 260, 118 P. (2d) 523; *Goodloe* v. *Jo-Mar Dairies Co.*, 163 Kan. 611, 185 P. (2d) 158.

The complaint assigns eight specific grounds of negligence as basis for recovery (15-18). They are:

(a) That the deceased truck driver drove the transport truck upon the tracks at the same time when its train was immediately approaching and near to and upon the crossing and when the train was so close to the crossing that it could not be stopped or its speed reduced to avoid a collision with the truck.

(b) That the deceased driver drove the truck upon the track without stopping his vehicle within 50 feet but not less than 10 feet from the nearest rail, to listen and look for any approaching train before proceeding,

as required by Section 8-566, 1947 Supplement to the General Statutes of Kansas, 1935.

(c) That the deceased truck driver failed to stop, look and listen before crossing the tracks in violation of Rule XXI of the State Fire Marshal of the State of Kansas.

(d) That the deceased driver went upon the tracks without heeding the railroad warning signs and without stopping, or that if he stopped he failed to look for and see plaintiffs' train which was near, but drove the vehicle upon the tracks in front of the train.

(e) That the deceased driver failed to look for trains, or seeing the same, failed to stop in a place of safety.

(f) That the deceased truck driver failed to look for the headlight of the train, or having looked, failed to observe the lights but drove upon the track ahead of the train.

(g) That if the deceased driver had kept a lookout for the approaching train, he could and would have seen the headlight and would have seen the train approaching, and could and should have heard the blasts of the whistle, and that he negligently did not see or discover the approach of the train, or if seeing the train he did not stop the truck before entering upon the track and was negligent in proceeding upon the track in front of the approaching train.

We most respectfully urge that while the circumstantial evidence adduced by the plaintiffs might be consistent with plaintiffs' allegations of specific negligence, yet the evidence upon which plaintiffs rely was no more than merely consistent with plaintiffs' theory, and did not go beyond that point, and that same circumstantial evidence does not exclude the equally plausible hypotheses that the truck was driven upon the tracks when it was safe to do so, and that for some unexplained reason it was still upon the tracks when the train approached.

In *Miller* v. *Gabbert*, 154 Kan. 260, 266, 118 P. (2d) 523, the Court said:

> "While negligence may be proved by circumstantial evidence (*Brown* v. *Clark*, 152 Kan. 274, 103 P. (2d) 907), the circumstance must point directly to negligence of the defendant, they must go further than to be merely consistent with negligence."

In *Lukens* v. *Kellogg*, 127 Kan. 568, 274 Pac. 225, the Court held that a theory cannot be said to be established by circumstantial evidence unless the facts relied upon are of such a nature and are so related to each other that it is the only conclusion that can reasonably be drawn from them, and that it is not sufficient that they be consistent merely with that theory; that liability cannot be based on bare guess, nor can a verdict rest on mere conjecture and that probabilities and plausible conjecture are not evidence.

We respectfully submit that plaintiffs' circumstantial evidence made for no more than probability and plausible conjecture, that plaintiffs did not produce sufficient evidence to entitle them to go to the jury on the issue of defendant's negligence. We believe that the trial court properly sustained our motion for a directed verdict because of plaintiffs' failure to come forward with proof establishing its case under the Kansas authorities. We believe that Judge Huxman's dissenting opinion correctly states the law of Kansas, and we respectfully refer this Court to the many authorities cited therein.

We respectfully submit that plaintiffs' evidence furnishes only surmise and speculation as a basis for recovery. Unless one relies on surmise and speculation there is a complete absence of probative facts to support the conclusion reached. This record affords no evidentiary

basis of defendant's negligence. Plaintiffs' case cannot be made without proof that the deceased truck driver was negligent, thus overcoming the legal presumption indulged in his favor. Since plaintiffs' evidence has not overcome those legal presumptions, they are without probative proof of any negligence of this defendant.

III.

The Court of Appeals was in error in failing to decide this case under the controlling Kansas authorities.

In *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 78, 58 So. Ct. 817, 822, 82 L. Ed. 1188, this Court said:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

We respectfully submit that the majority opinion of the Court of Appeals, in ruling our case, erroneously rested its opinion on a misconception of the holding of this Court in *Lavendar* v. *Kurn, supra,* and that it erroneously failed to apply or follow the law of Kansas so clearly defined in the cases to which we have called attention above. We respectfully urge that the majority opinion be reversed. Unless it is reversed mere surmise and conjecture become a basis of recovery in contravention of the firmly established rule, not only of the Courts of Kansas, but of this Court as well.

We challenge the respondents to show how the following questions can be answered, on the record, without resort to surmise and speculation based on presumption built on presumption and inference piled on inference:

1. Did the transport come to a complete stop before going upon the tracks?

2. Did the transport driver look and listen for the approach of the train before starting across the tracks?

3. Where was the train at the time the transport truck went upon the tracks?

4. How long was the transport truck on the tracks before it was struck?

We respectfully submit that the record furnishes no facts from which the answers to these questions can be drawn. Nor are the answers to these questions to be found in the majority opinion.

Conclusion.

Because of the great, general importance of the questions presented, your petitioner respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

GUY W. GREEN,
735 Lathrop Building,
Kansas City, Missouri,
Attorney for Petitioner.

IRWIN SNATTINGER,
National Bank of Topeka Bldg.,
Topeka, Kansas,
SAM MANDELL,
1111 Scarritt Bldg.,
Kansas City, Mo.,
Of Counsel.

APPENDIX.

Rule XXI of the State Fire Marshal of Kansas:

"Crossing Railway Tracks. Every vehicle transporting inflammable liquids by means of the public highways of this state shall, before passing over any railway or railroad tracks, except street railways within boundaries of incorporated cities or towns, be brought to a complete stop immediately and not proceed thereover until it is safe to do so. (Effective Jan. 1, 1936.)" (16)

Sec. 8-566, 1947 Supplement to the General Statutes of Kansas, 1935:

"Certain vehicles must stop at all railroad grade crossings. (a) The driver of any motor vehicle carrying passengers for hire, or of any school bus carrying any school child, or of any vehicle carrying explosive substances or flammable liquids as a cargo or part of a cargo, before crossing at grade any track or tracks of a railroad, shall stop such vehicle within fifty feet but not less than ten feet from the nearest rail of such railroad, and while so stopped shall listen and look in both directions along such track for any approaching train, and for signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely. (b) No stop need be made at any such crossing where a police officer or a traffic-control signal directs traffic to proceed. (c) This section shall not apply at street railway grade crossings within a business or residence district." (16)

No. 84

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

CONSUMERS COOPERATIVE ASSOCIATION,
PETITIONER,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, AND JOSEPH B. FLEMING AND AARON COLNON, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company,
RESPONDENTS.

BRIEF OF RESPONDENTS ON PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

W. F. PETER,
139 W. Van Buren,
Chicago, Illinois,
Attorney for Respondents.

John E. DuMars,
Clayton M. Davis,
Mark L. Bennett,
412 New England Building,
Topeka, Kansas,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

No.———

CONSUMERS COOPERATIVE ASSOCIATION,
PETITIONER,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, AND JOSEPH B. FLEMING AND AARON COLNON, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company,
RESPONDENTS.

BRIEF OF RESPONDENTS ON PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

Questions Presented.

The questions presented by petitioner, Petition page 6, in and of themselves disclose no reasons for the exercise of this court's discretion in granting a writ of certiorari, but on the contrary disclose that the petition for the writ should not be granted.

The questions presented amount to no more than a desire of petitioner for the Supreme Court to review the

application by the Court of Appeals of record evidence to well-established rules of local law in the State of Kansas. Essentially the questions are nothing more than a charge that the Court of Appeals erroneously adjudged that respondents' evidence was sufficient to be submitted to the jury in determining the negligence of petitioner's truck driver.

Jurisdiction and Reasons for Writ.

Petitioner's writ of certiorari asserts that the jurisdiction of the Supreme Court of the United States to review the judgment of the Court of Appeals is invoked under the provisions of 28 U. S. C. A., Section 1254, and Rule 38 of the Supreme Court.

The reason for granting the writ is stated to be that the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. Rule 38 5(b).

Nowhere in the petition for the writ or in the argument in support thereof does it appear that the Court of Appeals decided a question of local law in conflict with the decisions of the Kansas Supreme Court.

On the contrary, petitioner asserts, page 8, "the majority opinion correctly states the applicable controlling law of Kansas." The dissenting opinion, a part of which is quoted by petitioner, does not point out wherein such claimed conflict appears nor that in fact there is such conflict. The dissenting opinion is based upon the disagreement with the other members of the court in the

appraisal of respondents' evidence; and the dissenting opinion so states, viz.:

> "The only question on this appeal is whether the Rock Island introduced probative evidence, direct or circumstantial, of sufficient weight, which, if believed by the jury, would overthrow the prima facie case of the exercise of due care by the driver of the truck." (180 F. 2d 907)

There was and is not a disagreement in deciding a question of local law in a way probably in conflict with applicable local decisions. All members of the court appear to be in agreement as to the law of Kansas applicable to the issues in the case; it was only in the appraisal of the evidence to determine its sufficiency for consideration by the jury that the dissenting judge entertained a different view than the other members of the court.

The dissenting opinion does not consider all of respondents' evidence and the reasonable inferences to be drawn therefrom. Thus, the dissenting opinion states, 180 F. 2d 906:

> "All the evidence we have is that the terrain was level; that the train was running approximately 65 miles per hour; that the head light was burning and could be seen a great distance down the track; and that a crossing accident occurred. It is from these facts and from these facts *alone* that we must find negligence on the part of the driver of the truck to enable the railroad company to recover." (Emphasis supplied.)

The limited facts so considered by the dissenting judge, and the consideration of which only he attributes

to the other members of the court, omit many proved important and material indisputable facts. In addition to the "ground was level", "the headlight burning, which could be seen at a great distance", and "the train was traveling at a speed of approximately 65 miles per hour", which the dissenting opinion states to be the evidence, other facts were established directly bearing upon the negligence of the driver of the transport truck, viz.:

1. The driver of the motor transport was familiar with the highway and the crossing. (R. 27)

2. The crossing was level for 50 feet north of the crossing. (R. 55)

3. There was no fog, visibility was good, and there was no snow or ice on the highway. (R. 66, 91)

4. At any point within 240 feet north from the track, the truck driver had an unobstructed view and could see the train directly when it was more than 2,000 feet from the highway crossing and could see the light of the train as far as nearly 5 miles away. (R. 56; Exhibits 1, 2, 3, 5 and 7)

5. The crossing was planked solidly between and on the outside of the rails and was surfaced with the same material as the highway. (R. 54, 90)

6. The rails were the same height as the planks, making a smooth crossing. (R. 90)

7. There were no flares or other signals near the crossing (R. 90), which the law requires such vehicles to carry and drivers to place on the highway in the event

the vehicle becomes stalled. (G. S. of Kansas, 1947 Supp., 8-5,108)

8. The truck driver was in or about the truck when it was struck and he was killed, indicating the driver had not stalled the truck on the track (the same presumption arising from love of life upon which petitioner relies would have prompted the truck driver to leave the truck and protect himself if the truck had stalled on the track before the collision.) Smith v. Bassett, Petition page 15.

9. The engineer operating the train was a careful, alert, competent and observant engineer, always complying with the rules. (R. 65, 67, 82)

10. The engineer and fireman both appeared normal physically and were mentally alert when starting their run a short time before. (R. 67, 72, 73)

11. The engineer handled the train through the curves and stopped at the stations in a normal way prior to the collision, indicating he was alert and observant. (R. 67, 73)

12. The regular crossing whistle was sounded for the crossing where the accident occurred, and the whistle signal post for this crossing was one-fourth mile east of the crossing (R. 57; Exhibit 1), indicating that the engineer was observant of the track ahead, and proper warning signals given.

13. The engineer could see a truck at the crossing when the train was 1600 to 1800 feet from the crossing (R. 83), yet the brakes of the train were not applied at that time, indicating there was no truck on or dan-

gerously near the crossing when the train was at that point.

14. The speed of the train at the time was 60 to 65 miles per hour. (R. 66, 71)

15. The engineer applied the brakes of the train in emergency three to five seconds before the collision, which at 65 miles per hour would be 285 to 475 feet from the crossing (R. 62, 70, 75, 79); indicating that although keeping a lookout ahead, the first time the engineer realized the truck was not stopping or was entering upon the track was when the engine was 285 to 475 feet from the crossing.

16. After the collision the throttle of the engine was found in an idle position and the automatic brake valve was in full emergency position (R. 93).

17. Admissions of appellee that the truck "proceeded southerly to cross said tracks. That at *said* time" the train collided with the truck (R. 20, 21; *Rogers v. Burden & Co.,* 137 F. 2d 284; CCA 10; *Berry v. Dewey,* 102 Kan. 392, 170 Pac. 1000); indicating that the truck was not helplessly stalled on the track, *but was moving across the track.*

These and other *proven facts and circumstances* to to be gleaned from the record (including a stenographic transcript of evidence in excess of 250 pages, plus numerous depositions and exhibits) appear not to have been considered in the dissenting opinion, 180 F. 2d 907.

The dissenting opinion, Petition page 9, which petitioner asserts supports the reason for granting the writ, states:

> "The legal presumption that the deceased driver exercised due care implies that he looked, saw the approaching train, and had sufficient time to cross otherwise there could be no presumption that he exercised due care in attempting to cross the tracks."

This statement we believe misconceives the law of Kansas; for, the statement makes the legal presumption arising from the instinct of self-preservation, a conclusive presumption; instead of a rebuttable presumption which the Kansas Supreme Court has declared to be the law of Kansas. The statement means that because of the instinct of self-preservation, the truck driver "looked, saw the approaching train, and had sufficient time to cross" the track. If this be true and if the law was obeyed by the driver, then there was no collision. If there was a collision, then the statement is incorrect. The fact of the collision is not in controversy; there was a collision.

The conditions under which writs of certiorari may be granted by the Supreme Court of the United States are summed up by The Honorable Fred M. Vinson, Chief Justice of the United States, 69 S. Ct. V. Writs of certiorari are granted only when at least four Justices feel that the "*public importance* of the question presented requires its consideration by the Supreme Court." (Emphasis supplied.) The Chief Justice continues:

> "The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of *wide import* under the Constitu-

> tion, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. *** To remain effective, the Supreme Court must continue to decide only those cases which present questions, whose resolution will have immediate importance *far beyond the particular facts and parties involved.*" (Emphasis supplied.)

The Chief Justice then points out that a petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court, and that if it only is for the purpose of showing that the decision below might be erroneous, the petition has not fulfilled its purpose.

The petitioner herein has failed to meet the conditions outlined. Nowhere does the petition point out conflicts of opinion on federal questions that have arisen among lower courts; nor for that matter, that the question involved is of immediate public importance beyond the particular facts and parties involved. The petition is insufficiently predicated simply on the complaint of a losing litigant that the lower court's decision is erroneous. That such complaint of petitioner is without foundation is demonstrated by the following reply to petitioner's argument:

Argument.

Petitioner's argument, Points I, II and III, is in essence but one complaint, viz., the petitioner is dissatisfied with the conclusion of the Court of Appeals that an analysis of the evidence, including the reasonable inferences to be drawn therefrom, compels the con-

clusion that such evidence was sufficient to require submission to the jury for its determination of ultimate finding of whether or not petitioner's truck driver was guilty of negligence proximately causing the collision. Petitioner's argument does not point out or demonstrate that the Court of Appeals did not consider and apply the local law of Kansas.

The decision of the Court of Appeals, after agreeing with petitioner's complaint that negligence on the part of the truck driver could not be based upon speculation, conjecture, or presumption, states: "But plaintiff's case was not cast in that mold. It was of a different pattern." The court was of the opinion that the evidence did tend to establish probative facts and circumstances from which the jury, in the exercise of fair and impartial judgment, could reasonably draw the deduction that the driver of the transport was negligent in one or more of the particulars alleged in plaintiff's complaint. (180 F. 2d 900, 905)

The cases cited by petitioner were recognized and treated in the opinion and decision of the Court of Appeals. So were many other decisions of the Kansas Supreme Court relating to the question involved.

Again adverting to REASON FOR GRANTING THE WRIT (Petition for Writ, page 8), petitioner states and concedes that "the majority opinion correctly states the applicable controlling law of Kansas"; and the cases cited by petitioner in its argument, when read and analyzed, which was done by the Court of Appeals, do not vitiate petitioner's statement and concession that the

Court of Appeals has correctly stated the applicable controlling law of Kansas. For instance:

Petitioner's argument emphasizes and relies upon *Smith v. Bassett,* 159 Kan. 128, 134, 152 P. 2d 749; *Miller v. Gabbert,* 154 Kan. 260, 266, 118 P. 2d. 523; and *Lukens v. Kellogg,* 127 Kan. 568, 274 Pac. 225. The first of these, *Smith v. Bassett,* involved the death of a pedestrian laborer who was killed by a backing truck on private property along a narrow passageway, without the truck driver's employer having anyone stationed at the rear of the truck to warn the truck driver of persons who might be using the passageway. In the quotation cited by petitioner, Petition page 15, it will be noted the court carefully points out that there was a lack of evidence to overcome the presumption indulged in behalf of the deceased, *as a matter of law.* The opinion further states:

> "All of the evidence, when considered in the light most favorable to appellee, presented a situation where reasonable minds might differ as to whether decedent exercised reasonable care for his own protection. *Under such circumstances it was the province of the jury* to determine the question of decedent's contributory negligence (Meneley v. Montgomery, 145 Kan. 109, 112, 64 P. 2d 550, and cases therein cited) and the court so instructed the jury." (Emphasis supplied.)

This is consonant with the decision of the Court of Appeals in the present case.

Miller v. Gabbert, Petition page 18, was an action for damages resulting from a fire. The court points out

the general rule that negligence may not be based upon mere surmise, speculation and conjecture and then states:

> "There is no proof the gasoline would ignite spontaneously and there is no contention that it did. There was *no proof* whatever by plaintiff as to what caused the fire, much less any that it was any intervening act of the defendant." (154 Kan. 266) (Emphasis supplied.)

Lukens v. Kellogg cited by petitioner was an action based upon the theft of wheat, where again the Kansas Court applied the rule that liability cannot be based on *bare* guess, speculation or conjecture; and the syllabus by the court points out that there was "a *total want* of evidence of material facts requisite to establish a cause of action", which *total want* could not be supplied by surmise or conjecture.

On the other hand, the Kansas Supreme Court has decided cases in which the quantum and quality of circumstantial evidence was involved:

In *Railway Co. v. Wood,* 66 Kan. 613, 72 Pac. 215, the court said:

> "Circumstantial evidence in a civil case, in order to be sufficient to sustain the verdict of a jury, need not rise to that degree of certainty which will exclude any and every other reasonable hypothesis. The jury are not infrequently called on to decide between two or more theories, and in doing so may exercise their own best judgment in accordance with their oath-bound consciences. This must necessarily be so, for it is the province of the jury and not of the judge to determine whether the evidence better supports this or that theory."

Also,

"It is true, as announced in *Railway Co. v. Rhoades, supra,* that presumptions may not be based upon presumptions, and that it will not do to consider chance or circumstantial evidence having but a questionable or circumstantial basis of fact, *but this is very far from announcing that an undisputed fact may not be used as a basis from which to draw a reasonable conclusion,* even though some other and opposite conclusion equally reasonable might also be drawn; *otherwise we might have a condition where a question of fact could not be settled,* because the circumstances upon which its settlement depended might point to two or more equally reasonable conclusions. *As between two or more reasonable deductions from circumstantial evidence,* the court *is not at* liberty to direct which one *the jury shall adopt.*" (Emphasis supplied.)

Also, in *Supica et al. v. Armour & Company,* 131 Kan. 756, 758, 293 Pac. 483, the court said:

"Under our decisions it is not necessary in a civil action like this one that circumstantial evidence should rise to that degree of certainty which will exclude every other reasonable conclusion. (*Railway Co. v. Wood,* 66 Kan. 613, 72 Pac. 215; *Railway Co. v. Colliati,* 75 Kan. 56, 88 Pac. 534; *Hashman v. Gas Co.,* 83 Kan. 328, 111 Pac. 468; *Broseghini v. Coal Co.,* 92 Kan. 113, 139 Pac. 1025; *Watkins v. Harper County,* 95 Kan. 166, 137 Pac. 822; *Mayeur v. Mining Co.,* 106 Kan. 123, 186 Pac. 1035; *Lane v. Insurance Co.,* 113 Kan. 365, 214 Pac. 92)."

In *Rierson v. Southern Kansas Stage Lines Co.,* 146 Kan. 30, 69 P. 2d 1, in closing its opinion the court said:

"Without recounting in detail the testimony of the various witnesses, we think there was ample evidence to justify the findings of fact and the ver-

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should have seen (*McDonald v. Yoder*, 80 Kan 25, 101 Pac. 468; *Lilly v. Wichita Railroad & Light Co.*, 127 Kan. 527, 530, 274 Pac. 205)." (Emphasis supplied.)

Directly in point as declaratory of the laws of Kansas, and supporting the conclusion of the Court of Appeals, is the declaration of the Kansas Supreme Court in *Ogden v. Wilson*, 120 Kan. 269, 243 Pac. 284, wherein the court, in distinguishing between the rule applicable in street railway cases and steam railroad cases, said:

> "In the case of the railroad, the traveler is never regarded as exercising reasonable caution if he loses in a race with the train to the crossing. He is required to yield it the right of way and not undertake to cross until it has passed."

And, in *Rathbone v. Railway Co.*, 113 Kan. 257, 214 Pac. 109, an action by a husband for his wife's death in a railroad crossing collision, the court said:

> "It is settled law in this state that it is negligence to attempt to cross a railroad track ahead of a speeding train, even in a case where but for a defective crossing the party making such foolhardy attempt would have escaped unscathed, by a few ticks of the clock (Bunten v. Railway Co., 100 Kan. 165, 163 Pac. 801)";

and, again in *Pagan v. Lowden*, 145 Kan. 513, 66 P. 2d 567, an action to recover for the death of plaintiff's decedent, killed at a grade crossing by collision with a train, the court said:

> "Had deceased glanced down the track in the direction from which the train was coming when he was 25 feet away from the track he would undoubt-

> edlly have seen the train coming. The fact that his front wheels had barely come to a stop on the first rail when his car was struck shows that he must not have been looking just before he drove onto the track. Had he looked he surely would have seen the train coming in that short a time, even though it was going 60 miles an hour. *What must have happened is that he drove ahead and onto the tracks without keeping the lookout that an ordinarily prudent man should have kept under the circumstances.*" (Emphasis supplied);

and, in *Holman v. Railway Co.*, 113 Kan. 710, 215 Pac. 1111, a train-automobile collision case, the court said:

> "Under rules of logic frequently applied by this court, it is often held in crossing-accident cases that testimony and findings that a person had looked before crossing a railroad track and saw no train approaching *must be disregarded* because manifestly untrue since if the person looked, he must have seen whatever was within reasonable range of vision to be seen." (Emphasis supplied.)

Further, in *Gilbert v. Railways Co.*, 109 Kan. 107, 197 Pac. 872, a streetcar-automobile collision case, the court points out that the presumption arising from the natural love of life and instinct of self-preservation does not amount to proof:

> "It is nothing more than a presumption, the force of which is destroyed at once by proof to the effect that the person injured or killed did not exercise due care. In this case, the presumption, *if it could be said to have existed at all*, is destroyed by the finding of the jury to the effect that if Morris had exercised due care—had looked—he would have seen the approaching car in time to have stepped from

the running board and to have saved himself from injury." (Emphasis supplied.)

And, in *Gaffney v. Railway Co.*, 107 Kan. 486, 192 Pac. 736, where plaintiff's decedent was struck by a train, the court said:

> "It must be presumed that one having the capacity to see must have seen that which was within the range of his vision. (Young v. Railway Co., 57 Kan. 144, 45 Pac. 583.) Under such circumstances, one who can see and learn of the danger if he looks, is held to have knowledge of the danger even if he does not look."

And finally, in view of petitioner's insistent reliance upon the lack of an eye witness to the collision in question, the Kansas Supreme Court in *Sawhill v. Casualty Reciprocal Exchange*, 152 Kan. 735, 107 P. 2d 770, said:

> "It also is true that when plaintiff rested his case no one had testified who had been an eye-witness to the collision. *But the testimony of eye-witnesses is not always essential. Evidence of physical facts and circumstances may be sufficient.* Here there was substantial, competent evidence that the collision occurred in the northeast quarter of the intersection, a place where plaintiff, driving north, had a right to be, and where the defendant Hubert, driving east, should not have been." (Emphasis supplied.)

Like the defendant in the Sawhill case, petitioner's truck driver in this case had no right to be upon the railroad track when respondents' train was immediately approaching.

The foregoing are but a few of the cases stating the well-established law of Kansas relating to railroad crossing collisions, which fully justifies the statement of the Court of Appeals in its opinion in the present case, as follows:

> "And in order for the issue to be one for the jury under appropriate instructions of the court, it was not essential that the evidence be of such character as to establish a basis for the jury to determine with the definiteness of mathematical certainty between these reasonable inferences, as in either event the driver of the transport was negligent and his negligence was the cause of the accident."

Conclusion.

Where conclusions of Courts of Appeals depend on appreciation of circumstances which admit of different interpretations, the Supreme Court will not interfere. *Federal Trade Commission v. American Tobacco Co.,* 274 U. S. 543, 47 S. Ct. 663, 71 L. Ed. 1193. The jurisdiction conferred on the Supreme Court to review decrees of the Courts of Appeals on certiorari was not conferred merely to give the defeated party another hearing, but to secure uniformity of decision and to bring up cases of importance, which it is in the public interest to have decided by the court of last resort. *Magnum Import Co. v. Coty,* 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922. The Supreme Court does not grant certiorari to a Court of Appeals to review evidence and to discuss specific facts. *U. S. v. Johnston,* 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925.

Because petitioner has failed to demonstrate a question of "public importance" requiring consideration by the Supreme Court; because the opinion of the Court of Appeals presents no conflict of opinion on federal questions requiring resolution by the Supreme Court; because there is presented no question whose resolution will have "immediate importance far beyond the particular facts and parties involved"; because the decision of the Court of Appeals does not conflict with decisions of the Kansas Supreme Court but is in accord therewith; and because there is no explanation why it is vital that the question involved be decided finally by the Supreme Court of the United States, but only the expressed dissatisfaction of petitioner with the decision of the Court of Appeals as to the quality of respondents' evidence, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

W. F. PETER,
139 W. Van Buren Street,
Chicago, Illinois,
Attorney for Respondents.

JOHN E. DuMARS,
CLAYTON M. DAVIS,
MARK L. BENNETT,
412 New England Building,
Topeka, Kansas,
Of Counsel.